

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of:

Empowering Consumers to Prevent and
Detect Billing for Unauthorized Charges
("Cramming")

Consumer Information and Disclosure

Truth-in-Billing and Billing Format

CG Docket No. 11-116

CG Docket No. 09-158

CC Docket No. 98-170

**COMMENTS
OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION
AND THE PEOPLE OF THE STATE OF CALIFORNIA**

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I. INTRODUCTION AND SUMMARY

The California Public Utilities Commission and the People of the State of California (CPUC or California) submit these comments in response to the above-referenced Notice of Proposed Rulemaking (NPRM) released July 12, 2011, seeking comment on rules designed to assist consumers in detecting and preventing the placement of unauthorized charges on their wireline telephone bills (“cramming”).¹ The Federal Communications Commission (FCC or Commission) also seeks comment on whether it should extend any of the proposed rules to wireless (Commercial Mobile Radio Service or CMRS) carriers² and providers of interconnected Voice over Internet Protocol (VoIP) service.³

Cramming is an on-going concern in California. In 1998, the California legislature enacted Public Utilities Code § 2890, which provides that “[a] telephone bill may only contain charges for products or services, the purchase of which the subscriber has authorized.” In the event the customer disputes a charge, § 2890(d) establishes a rebuttable presumption “that an unverified charge for a product or service was not authorized by the subscriber and that the subscriber is not responsible for that charge.” At the same time, the California Legislature also enacted § 2889.9, which bars entities from misrepresenting an association with a telephone carrier in soliciting sales. In 2006,

¹ NPRM at para. 1.

² NPRM at para. 53.

³ NPRM at para. 69.

the CPUC adopted regulations (General Order 168, Part 4) to implement the new laws.⁴ The CPUC subsequently strengthened its cramming regulations in October, 2010, finding that consumers were “deeply frustrated” to find recurring unauthorized charges on their monthly bills despite extensive time and effort to dispute the charges.⁵ The CPUC regulations apply to both wireline and wireless telephone corporations, and among other things, require such companies to offer customers the option to block all third-party billings. The CPUC also extended cramming reporting requirements to wireless telephone companies.

Although the CPUC supports the FCC’s efforts to strengthen federal rules and establish additional safeguards to enable consumers to protect themselves from cramming, we strongly urge the FCC to not preempt existing state laws that are consistent with any regulations ultimately adopted by the FCC. Nor should the FCC preempt the states from adopting more restrictive state laws. States such as California that have made a strong commitment to protecting consumers against cramming should be free to devise additional safeguards to protect their citizens against such unlawful activity. Moreover, since enforcement of consumer protection laws is a key function of state government, the CPUC believes that state commissions should be the entities to which consumer complaints are brought, and states should have the right to enforce federal cramming regulations, just as they do with slamming regulations. As discussed

⁴ CPUC Decision No. D.06-03-013, *Decision Issuing Revised General Order 168 Market Rules to Empower Telecommunications Consumers and to Prevent Fraud* (issued Mar. 9, 2006).

⁵ CPUC Decision No. D.10-10-034, *Final Decision Adopting California Telephone Corporation Billing Rules* (issued Nov. 2, 2010).

below, we support a dual enforcement regime for the FCC's cramming rules, recognizing that consumer protection is a primary duty of the state commissions.

The CPUC accordingly offers the comments set forth below on the FCC's proposed cramming rules. For the convenience of the Commission, the CPUC has attached a complete set of the CPUC's cramming rules set forth in CPUC General Order 168, Part 4, attached as Appendix A. The CPUC has also prepared a side-by-side comparison of the questions for comment in the NPRM and California's statutes and regulations related to cramming, attached as Appendix B.

II. DISCUSSION

A. Measures to Assist Consumers in Preventing Cramming

1. Disclosure of Blocking of Third-Party Charges

The FCC proposes that wireline carriers that offer subscribers the option to block third-party charges from their telephone bills must clearly and conspicuously notify subscribers of this option at the point of sale, on each bill, and on their websites.⁶ The CPUC supports this proposal but recommends that the FCC require *all* carriers *to offer* the option to block all third-party charges, including wireless and VoIP providers. As noted in the NPRM, many consumers are unaware that third-party charges can even be placed on their telephone bills.⁷ Moreover, consumers are often misinformed about the availability of third-party blocking. For example, the CPUC has received complaints of carriers telling subscribers who request a block of third-party charges that state and

⁶ NPRM, at para. 40.

⁷ *Id.*, at para. 41.

federal laws mandate that the carrier provide billing to third parties.⁸ The CPUC has also found that subscribers who are aware that their bills are open to charges from third parties may be more diligent in examining their bills for unauthorized charges.⁹ Thus the CPUC agrees that “educating consumers of the protections offered by blocking of third-party charges is vital to ensure that consumers exercise their option to request such safeguards.”¹⁰

In addition to educating the consumer, however, the CPUC believes that the key solution to cramming is to empower consumers by providing and informing them of the option to block third-party charges on their telephone bills. Until state and federal regulators put consumers before profits, cramming will continue unabated. The CPUC accordingly recommends that the FCC require all carriers to offer the option to block third-party charges. Consumers should be able to exercise this option easily at any time, and the option to block should be provided at no additional cost to the subscriber. Most billing telephone corporations already offer subscribers the ability to block third-party charges, free of charge.¹¹ California also requires billing telephone corporations to offer the option to block third-party charges at any time and at no additional cost.

The FCC also seeks comment on further modifications or refinements to the requirement that such a notice be “clear and conspicuous” to the consumer, including

⁸ See, CPUC D.10-10-034, *mimeo*, at 30.

⁹ *Id.*, at 47, Finding of Fact No. 12.

¹⁰ NPRM, at para. 41.

¹¹ *Id.*, at para. 44; see also CPUC D.10-10-034, *mimeo*, at 30.

wording, placement, and font size of the notice, identification and description of the specific kinds of charges that would be blocked, and modifications to ensure that notices are clear and conspicuous to specific population groups.¹² The CPUC recommends that, at a minimum, the FCC require that the billing telephone company shall explain the blocking option in neutral terms and shall not attempt to influence the subscriber's decision. The CPUC also recommends that, at a minimum, the FCC should require that telecommunications service providers give such notice, as well as any written or oral solicitation materials used to obtain an order for a product or service, in the same language as the written order initiating service.¹³

The CPUC's cramming rules further provide that for wireline carriers, this option to block third-party services shall not extend to any services they are required by law to provide, such as the option to purchase long distance services from a competitor, nor shall it apply to services or products offered by their affiliates.¹⁴ The CPUC recommends that the FCC adopt similar exceptions.

B. Measures to Assist Consumers in Detecting Cramming

The FCC seeks comment on the proposal to require that charges from third-parties be placed in a separate section from charges assessed by carriers and their affiliates on wireline telephone bills.¹⁵ The FCC also seeks comment on whether more specific

¹² NPRM, at para. 42.

¹³ The CPUC is mindful that many, if not most, third-parties placing items on customers' bills may not be subject to the FCC's jurisdiction.

¹⁴ CPUC General Order 168, Part 4, Rule 5, Responsibilities of Billing Telephone Corporations.

¹⁵ NPRM, at paras. 45, 46.

requirements are needed concerning the disclosure of third-party vendor contact information.¹⁶ California's Public Utilities Code section 2890(d) provides, in part:

1. A billing telephone company shall clearly identify and use a separate billing section for, each person, corporation, or billing agent that generates a charge on a subscriber's telephone bill. A billing telephone company may not bill for a person, corporation, or billing agent, unless that person, corporation or billing agent complies with paragraph (2).
2. Any person, corporation, or billing agent that charges subscribers for products or services on a telephone bill shall do all of the following:
 - (A) Include, or cause to be included, in the telephone bill the amount being charged for each product or service, including any taxes or surcharges, and a clear and concise description of the service, product, or other offering for which a charge has been imposed.
 - (B) Include, or cause to be included, for each entity that charges for a product or service, information with regard to how to resolve any dispute about that charge, including the name of the party responsible for generating the charge and a toll-free telephone number or other no cost means of contacting the entity responsible for resolving disputes regarding the charge and a description of the manner in which a dispute regarding the charge may be addressed. Each telephone bill shall include the appropriate telephone number of the commission that a subscriber may use to register a complaint.
 - (C) Establish, maintain, and staff a toll-free telephone number to respond to questions or disputes about its charges and to provide the appropriate addresses to which written questions or complaints may be sent.

Consistent with California's requirements, the CPUC supports the proposal to require all carriers to clearly identify and use a separate billing section for each person,

¹⁶ *Id.*, at para. 55.

corporation, or billing agent that generates a charge on a subscriber's telephone bill. The CPUC recommends that, at a minimum, the FCC require carriers to include in the telephone bill the amount being charged for each third-party vendor product or service, including any taxes or surcharges, and a clear and concise description of the service, product, or other offering for which a charge has been imposed. The carrier should also be required to provide contact information for each third-party vendor, including a toll-free telephone number for the third-party vendor to respond to questions or disputes about its charges and an appropriate address to which written questions or complaints may be sent.

C. Disclosure of Commission Complaint Contact Information to Enhance the Ability of Consumers to Resolve Cramming Disputes

The FCC seeks comment on a requirement that each wireline telephone bill, as well as the customer service section of each wireline carrier's website, include a clear and conspicuous statement indicating that consumer inquiries and complaints may be submitted to the FCC.¹⁷ Enforcement of consumer protection measures is a key function of state commissions. The CPUC has been actively engaged in tracking and prosecuting cramming allegations. In order to successfully enforce cramming rules, however, a state commission must be informed of complaints and problems. California state law, for example, requires that each telephone bill include the CPUC's telephone number that a

¹⁷ NPRM, at para. 51.

subscriber may use to register a complaint.¹⁸ Therefore, the CPUC urges the Commission to require carriers to include a statement on their bills (and website, if applicable) indicating that consumer inquiries and complaints may be submitted to the relevant state commission, with applicable contact information, either in addition to or in lieu of providing contact information for the FCC. At the very least, the FCC should not preempt any state law or regulation which requires carriers to include state commission contact information on their bills.

D. Applying Cramming Rules to Wireless Service and VoIP Providers

The FCC seeks comment on whether any of the proposed rules for wireline carriers should be applied to CMRS carriers and providers of interconnected VoIP service.¹⁹ The CPUC's cramming rules treat wireline and wireless services the same.²⁰ The CPUC strongly urges the FCC to apply cramming regulations to wireless service providers, as well as to VoIP providers where feasible. There is record evidence in this proceeding that CMRS and VoIP consumers have been the target of cramming.²¹ No matter what communications technology consumers adopt, they should not be subject to

¹⁸ Cal. Pub. Util. Code § 2890(d)(2)(B).

¹⁹ NPRM, at paras. 52, 53, 69.

²⁰ California's cramming rules currently do not apply to VoIP providers. However, there is a pending motion before the CPUC to consider the question of whether to apply state consumer protection rules to VoIP providers. *See Motion of CPUC Consumer Protection and Services Division for Modification of the Scope of Rulemaking to Include Consumer Protection*, filed Mar. 8, 2011, in Rulemaking 11-01-008, *Rulemaking to Require Interconnected Voice over Internet Protocol Service Providers to Contribute to the Support of California's Public Purpose Programs*. The CPUC has not yet ruled on this motion. The CPUC's position that the FCC should apply federal cramming rules to VoIP providers is not intended to prejudge the CPUC's determination on whether to apply state consumer protection measures to VoIP providers.

²¹ *See* NPRM discussion at paras. 29, 31, 32, 36, 52.

unauthorized charges on their bills. General fraud laws do not provide subscribers who have been crammed with a remedy for swift redress nor do they give state utility commissions or the FCC adequate ability to monitor the incidences of cramming. The principle of competitive neutrality further requires that consumer protection measures should not unfairly advantage one service provider over another. Indeed, both federal and state law mandate that regulation be technology-neutral; exempting VoIP and/or wireless providers from cramming rules would thwart that regulatory goal.²² The CPUC is mindful that VoIP providers assert that they are “information service providers”, but absent a declaration of same from the FCC, VoIP providers arguably are providing a telecommunications service, as defined in federal law. The underpinning of both California and federal law is to treat all providers of a like service in a like manner, whether the facilities used are wired or wireless.

Wireless and VoIP service providers can and do engage in cramming, as evidenced by the cramming complaints the CPUC has received.²³ VoIP subscribership is increasing, and as it does so, the inequality of failing to apply the same set of regulations to all classes of providers becomes all the more obvious and inexplicable. No

²² See Cal. Pub. Util. Code § 234, defining “telephone corporation”, and § 233, defining “telephone line”, which includes the words “with or without wires”. See also Cal. Pub. Util. Code §§ 709.5 and 709.6, intended to spur competition in local telephone markets, which do not distinguish between types of service providers, and include a reference to “all telecommunications service providers” (§ 709.6(b)). See also 47 U.S.C. § 153, definition 46 “telecommunications service”, which includes the phrase “regardless of the facilities used”. See also 47 U.S.C. § 254(b)(4), which mandates that all providers of “telecommunications services” should make an “equitable and nondiscriminatory contribution” to support universal service.

²³ See NPRM, at para. 29, *citing* Letter from Phillip Enis, Program Manager, California Public Utilities Commission, to Stephen Klitzman, Deputy Chief, Office of Intergovernmental Affairs, Consumer & Governmental Affairs Bureau, FCC (April 5, 2011).

communications company should be permitted to charge subscribers unauthorized charges, or bill and collect unauthorized charges on behalf of a third party (for which the billing company gets compensated by the third party). The take rate for VoIP service is only expected to grow and may well become the primary method of voice communication for the foreseeable future. The FCC's goal of consumer protection would be promoted by applying its cramming rules to VoIP providers as well as wireless providers, so long as it does so in a competitively neutral manner.

The FCC also seeks comment on whether current wireless industry practices or voluntary industry guidelines can address any cramming issues successfully.²⁴ The CPUC found that wireless industry practices were not sufficient to address cramming issues. The NPRM notes that industry guidelines such as the CTIA's "Consumer Code for Wireless Service", "Checklist for Choosing Your Service and Device" and "General Wireless FAQ" do not appear to address the specific practices that are the subject of the proposed rules.²⁵ The CPUC similarly found that industry practices and guidelines, including the Mobile Marketing Association's (MMA) "U.S. Consumer Best Practices", do not meet the requirements of California's consumer protection laws:

Currently, wireless carriers place charges for third-party content on a subscriber's bill if a text message is sent to request the third-party content and then affirmed after being informed of the price. The carriers maintain that this "double opt-in" process ensures that only third-party charges authorized by the subscriber are placed on the subscriber's

²⁴ NPRM, at para. 54.

²⁵ *Id.*

bill. Finally, CTIA states that the “best practices guidelines” developed by the MMA directly address how charges can be placed on a subscriber’s bill. It has been suggested that these proposed rules are not needed due to the adoption of the MMA’s best practices guidelines by most of the wireless carriers. We do not agree, as we do not believe the MMA guidelines sufficiently meet the requirements of §§ 2889.9 and 2890. For example, the MMA guidelines would allow any person in possession of the wireless handset to authorize charges to be placed on the subscriber’s bill, not just the subscriber as mandated by § 2890.

As clarified in the revised rules, only the subscriber may authorize that a charge be placed on his/her bill. Since the current MMA guidelines do not currently limit authorization to the subscriber, use of the double opt-in process to purchase third-party content and services does not, by itself, demonstrate affirmative authorization by the subscriber.²⁶

Because industry guidelines do not appear to meet the consumer protection requirements proposed in the NPRM and because industry participants have not uniformly adopted such practices, the guidelines cannot and should not be an effective alternative to expanded FCC regulation.

E. Additional Questions for Comment

1. Due Diligence

The FCC seeks comments on whether it should require carriers, before contracting or agreeing with a third-party vendor to place its charges on customers’ telephone bills, to screen each such vendor to ensure that it has operated and will continue to operate in compliance with all relevant state and federal laws.²⁷ The FCC also asks for comment on

²⁶ CPUC Decision D.10-10-034, *mimeo*, at 28-29.

²⁷ NPRM, at para. 64.

how carriers are currently monitoring and tracking customer complaints with respect to cramming.

The CPUC has found that customers do not always carefully check bills and often pay small charges, even if unauthorized, because of the time and inconvenience that must be spent disputing the charge. The CPUC stated in D.10-10-034, “[c]arriers must prevent or detect what the federal court [in *F.T.C. v. Inc21.com Corp.*, 745 F. Supp. 2d 975 (N.D. Cal. 2010)] called ‘fraudsters’ from surreptitiously placing unauthorized charges on many bills, cheerfully refunding to those that complain, and pocketing the payments from the unsuspecting.”²⁸ The CPUC found that ensuring comprehensive refunds for all unauthorized charges is essential to removing the reward for unauthorized billing. To further address this situation for all wrongfully billed subscribers, the CPUC revised its rules to clarify that billing telephone corporations have an affirmative duty to investigate, not only when there are allegations of unauthorized billings, but also when there are reasonable grounds for concern. The revised rules also make clear that a billing telephone corporation is responsible for refunding all unauthorized charges presented in its bill, regardless of whether the unsuspecting subscriber may have paid the charge.

Specifically, the CPUC’s rules provide:

Billing Telephone Corporations shall bill Subscribers only for authorized charges. Billing Telephone Corporations shall adopt protocols which prohibit Billing Agents and Service Providers from submitting, directly or indirectly, charges for billing through a Billing Telephone Company that the Subscriber has not authorized. Billing Telephone

²⁸ CPUC D.10-10-034, *mimeo*, at 33.

Corporations must monitor or cause to be monitored, either directly or through a Billing Agent, or other entity, each Service Provider's continuing compliance with this requirement. Such monitoring shall include review of the Service Provider's marketing materials, scripts, customer verification records, or other such information as may be necessary to demonstrate that the Service Provider is obtaining valid Subscriber authorizations.²⁹

The CPUC's rules also require the billing telephone company to conduct a reasonable inquiry into the third-party vendor's history of violations of state or federal consumer protection laws. Specifically, General Order 168, Part 4, Rule 5 provides:

Responsibilities of Billing Telephone Corporations: Prior to approving a Service Provider or Billing Agent for the provision of billing services, the Billing Telephone Corporation shall directly or through another entity conduct a reasonable inquiry of the Service Provider's or Billing Agent's history of violations of state or federal law or rules relating to consumer protection and current ability to operate lawfully.

CPUC rules also make each billing telephone company responsible for monitoring the billings it controls for the purpose of preventing and detecting unauthorized charges, and for the prompt termination of billing services to billing agents and service providers that present unauthorized charges. The rules further require each billing telephone corporation to have in place and comply with a protocol for identifying unauthorized charges and suspending or terminating billing services to any billing agent or service provider that has submitted unauthorized charges.³⁰

²⁹ CPUC General Order 168, Part 4, Rule 4.

³⁰ CPUC General Order 168, Part 4, Rule 6, Monitoring of Subscriber Billings.

The CPUC recommends that the FCC adopt similar rules placing an affirmative obligation on the carriers to screen third-party vendors prior to contracting with them to ensure they have and will operate in compliance with all relevant consumer protection laws. This duty to investigate should apply not only when there are allegations of unauthorized charges, but when there are reasonable grounds for concern that a third-party vendor is engaged in unauthorized billing. The FCC should also clarify that the carrier is responsible for refunding all unauthorized charges presented in its bill, regardless of whether the unsuspecting subscriber may have paid the charge.

2. Federal-State Coordination

The FCC recognizes that a coordinated effort between state and federal regulatory agencies that monitor and enforce laws on cramming is critical in protecting consumers from unauthorized charges. As stated above, consumer protection and enforcement is a key function of state commissions. The CPUC has engaged in extensive efforts to protect and empower consumers against unauthorized charges on their phone bills. The CPUC is a primary point of contact for customers and our Commissioners interact with consumers on a wide variety of complaints concerning communications services, including those related to billing. We believe that California consumers are better off having the ability to bring their complaints to the CPUC for resolution rather than having to seek recourse through the state or federal courts, or at the FCC. The CPUC has supported a dual enforcement regime for the FCC's slamming rules, and considers this model to be one that works well at the state level and would work well for enforcement of federal cramming rules. Accordingly, consumers should have the option of filing complaints

either with the states or with the FCC. This dual system recognizes the important state role in enforcement and allows states to exercise their police powers.

In addition, regardless of what new rules the FCC adopts, the CPUC strongly opposes any preemption of existing state cramming laws and regulations or fraud statutes. Instead, the CPUC proposes that the FCC set up a dual system wherein states that have already adopted cramming laws or regulations for wireline, wireless, or VoIP providers, the existing state laws and regulations would continue to apply going forward. Any regulations the FCC may adopt would apply in states that have not implemented rules against cramming or where the state's cramming rules are less stringent than the FCC's rules. This type of dual solution already exists for eligible telecommunications carrier (ETC) designation and Lifeline certification/verification rules and works well. In the alternative, the FCC should not prohibit any state from adopting stricter cramming rules.

The FCC also seeks comment on whether wireline and wireless carriers should report trends or spikes in complaints they receive relating to third-party vendors to the appropriate federal or state regulatory agency.³¹ The CPUC requires reports of cramming complaints from wireline carriers and billing aggregators. Beginning in January 2011, wireless carriers are also required to submit quarterly reports to the CPUC of the total number and amount of wireless refunds they issued to California consumers, including those for cramming. The CPUC also tracks and handles complaints directly from

³¹ NPRM, at para. 66.

consumers, and has successfully prosecuted many formal cramming cases under California's anti-cramming statutes and regulations. Because of the strong interest states have in enforcing consumer protection measures, if the FCC adopts any carrier reporting requirements that apply to all states, the CPUC strongly urges the FCC to require carriers to file those reports with the state commissions, whether in conjunction with filing at the FCC or in lieu of filing with the FCC.

3. Accessibility

The FCC seeks comment on how the proposed rules could be improved to better assist people with disabilities, people living in Native Nations on Tribal lands and in Native communities, and people with limited English proficiency.³² As stated above, the CPUC recommends that the FCC require telecommunications service providers to provide notice of the option to block, and any written or oral solicitation materials used to obtain an order for a product or service, in the same language as the written order initiating service. The CPUC's rules also require all billing telephone corporations that offer third-party billing and collection services to cooperate with the CPUC's Telecommunications Division and the Consumer Protection and Safety Division and participate in meetings and workshops for the purpose of developing materials to educate consumers on how to avoid having unauthorized charges placed on bills.

³² *Id.*, at para. 68.

III. CONCLUSION

California appreciates the opportunity to comment on these important issues, and urges the FCC to consider and adopt the consumer protection proposals described above. We believe, however, that the FCC's primary focus in combating cramming should be empowering the consumer with the ability to block third-party charges on their telephone bills, and strongly support the FCC's proposal to require carriers to offer subscribers the option to block third-party charges from their telephone bills at the point of sale, on each bill, and on their websites.

Respectfully submitted,

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